

REMARKS

Applicants respectfully request reconsideration of the rejections of the claims of the instant application in view of the following remarks.

I. STATUS OF THE CLAIMS

Claims 24, 26, 28-38, 40-49, 51, and 52 are presently pending and under consideration. Claims 1-23, 25, 27, 39, and 50 have been previously cancelled, without prejudice. Applicants reserve the right to file a continuation or divisional application on any non-pursued subject matter. No claims are amended. No new claims are added. No new matter is presented.

II. SUMMARY OF THE INVENTION AS CLAIMED

One aspect of the claimed subject matter is directed to a wax dispersion with an average particle size of 0.5 to 100 μm comprising (a) 10-75% of a wax phase with a melting point in the range of above 25 to about 50 $^{\circ}\text{C}$, comprising at least one oil or wax component selected from the group consisting of dialkyl(ene) ethers, dialkyl(ene) carbonates, dicarboxylic acids, hydroxyfatty alcohols and mixtures thereof, and at least one emulsifier, and (b) a water phase (claims 24, 26 and 28-35). Another aspect of the claimed invention as currently amended is drawn to a wax dispersion comprising (a) 10-25% of a wax phase having a melting point in the range of about 35 to about 50 $^{\circ}\text{C}$ and (b) 75-90% of a water phase (claims 36-38 and 40-43). Another aspect of the claimed subject matter as presently amended is directed to a process for the production of such wax dispersions (claims 44-49). Yet another aspect of the invention as claimed is directed to a body care preparation comprising such wax dispersions (claims 51-52).

III. REJECTIONS UNDER 35 U.S.C. § 103(a)

Claims 24, 26, 28-38, 40-43, 51, and 52 are patentable over Ansmann (U.S. Patent No. 6,365,168) in view of Fogel (U.S. Patent No. 5,840,285). Ansmann relates to compositions comprising (1) pearlescent waxes with an average particle size of 12-14 μm comprising dialkyl ethers, (2) cationic polymers, and (3) emulsifiers. Fogel discloses dermatological compositions comprising esters of fumaric and maleic acids. While the Examiner acknowledges that Ansmann does not disclose that the wax phase has a melting point between 25 and 50 $^{\circ}\text{C}$, the Examiner states that Fogel discloses that cosmetic solids ideally melt at body temperature, and that it would have been obvious to select the ideal melting point for the solid phase.

In Applicants' communication dated August 2, 2010, Applicants averred that the wax phase disclosed by Ansmann would necessarily have a melting point above 50 $^{\circ}\text{C}$ by virtue of the melting point of distearyl ether (about 64 $^{\circ}\text{C}$) and lauryl glucoside (about 77 $^{\circ}\text{C}$), which are present in amounts of 1% by weight and 15% by weight, respectively, in Ansmann's Formulation 1 of Table 1. In the present Office Action, while the Examiner acknowledges that such a composition "would result in a melting point above 50 $^{\circ}\text{C}$," the Examiner states that "this is not the only composition Ansmann teaches." Office Action, p. 8. The Examiner cites to a list of possible components disclosed by Ansmann, one of which is dicetyl ether, which the Examiner states has a melting point of 55 $^{\circ}\text{C}$. The Examiner appears to state further that this melting point is within the presently claimed range of above 25 $^{\circ}\text{C}$ to about 50 $^{\circ}\text{C}$.¹ The Examiner further states that Ansmann discloses sodium laureth sulfate as an emulsifier (used in example Formulations 2-4), which has a melting point/melting range of 10-15 $^{\circ}\text{C}$. The Examiner concludes that, "[t]herefore, **it would be possible** that the wax phase disclosed by Ansmann **could** have a melting point in the range of from above 25 $^{\circ}\text{C}$ to about 50 $^{\circ}\text{C}$." Office Action, p. 9 (emphasis added).

Applicants respectfully traverse this rejection at least because the Examiner's conclusion of obviousness is based on improper hindsight reasoning. "[I]mpermissible

¹ While Applicants may not necessarily agree with the Examiner's assertion, Applicants traverse the present rejection without addressing the validity of this presumption.

hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art.” MPEP § 2142. Applicants have discovered that wax dispersions in use with substrates (e.g., tissue papers) are unsatisfactory in their skin-care effect and often leave the skin feeling too greasy and, in some cases, are distinguished by an overly slow release of active ingredients. Applicants have surprisingly discovered that providing wax dispersions with an average particle size of 0.5 to 100 μm containing a wax phase with a melting point above 25 °C to about 50 °C selected from the group consisting of dialkyl(ene) ethers, dialkyl(ene) carbonates, dicarboxylic acids, hydroxyfatty alcohols, and mixtures thereof, and at least one emulsifier, and a water phase, possess excellent sensory and care properties, and are very easy to apply to substrates. Indeed, Examples 1 to 5 of the instant application illustrate that such compositions can be applied more advantageously than known compositions (see Comparison Example 1) and demonstrate superior sensory properties and storage ability. While not intending to be bound by theory, it is surmised that such wax compositions can readily penetrate into a substrate, which would be distinguished by the efficient release of active components and by particular mildness and dermatological compatibility. These properties readily distinguish the instant invention from the cited art and rebut the argument of obviousness.

As acknowledged by the Examiner, compositions such as Ansmann’s Formulation 1 would result in a melting point above 50 °C. While Ansmann may disclose other oil or wax components, nothing in Ansmann addresses the problem of obtaining a suitable wax phase with a melting point in the range of from above 25 °C to about 50 °C. Accordingly, there is no disclosure, suggestion, or motivation for selecting which of Ansmann’s list of components is suitable to achieve the unexpected advantages of the presently claimed invention. In fact, Applicants submit that the compositions exemplified in Ansmann (which are presumably the most preferred embodiments) do not meet the functional limitations recited by the presently claimed invention (i.e., a melting point in the range of from above 25 °C to about 50 °C). While the Examiner appears to argue that it would be “**possible**” to select the proper components to achieve

such a functional limitation, a conclusion of obviousness based on this alone impermissibly relies on hindsight reasoning.

In addition, Applicants respectfully reassert the arguments presented in Applicants' correspondence dated August 2, 2010; i.e., that Fogel does not disclose or suggest to one skilled in the art how to modify the composition of Ansmann to obtain the presently claimed composition and melting point range of the recited wax phase.

Applicants submit that Fogel does not teach or suggest to one skilled in the art a composition analogous to that disclosed by Ansmann having the claimed melting point range. Applicants respectfully reassert that Fogel is an improper reference to support the present obviousness rejection, and cannot cure the deficiency of Ansmann. More specifically, Fogel refers to the ideal physical properties of a cosmetic ester. Indeed, Fogel relates specifically to esters, which are not recited by the presently claimed invention. In the Office Action dated August 28, 2009, the Examiner stated that Fogel "indicates only that an ideal physical property of cosmetics (i.e. a melting point near body temperature) has been difficult to achieve in esters" and that "[t]here is no implication that the physical properties are not similarly desirable in other oily/waxy cosmetic substances." Office Action, pp. 3-4.

Applicants submit that such melting points have also been difficult to achieve in the instantly claimed wax phase. Indeed, as noted above, Ansmann does not disclose or suggest the claimed wax phase having the recited melting point. Fogel does not fill this gap. "A conclusion of obviousness requires that the reference(s) relied upon be enabling in that it put the public in possession of the claimed invention." MPEP § 2145. Here, while Fogel may disclose how achieve an ester composition with a melting point near body temperature, Fogel in no way teaches or suggests how to modify the composition of Ansmann to achieve the claimed melting point range.

Likewise, claims 44-49 are patentable over Ansmann in view of Fogel and further in view of Bucheler et al. (U.S. Patent No. 4,996,004). The Examiner acknowledges that Ansmann and Fogel fail to teach the claimed production method, but states that Bucheler discloses a preparation method for stable cosmetic dispersions of organic

substances in water. Applicants respectfully traverse this rejection for at least the reasons discussed above; that is, that Fogel and Bucheler do not disclose or suggest to one skilled in the art how to obtain the presently claimed composition and melting point range of the recited wax phase.

Accordingly, the Examiner is respectfully requested to withdraw the instant rejection.

CONCLUSION

In view of the abovementioned remarks Applicants respectfully assert that this application is now in condition for allowance. The Examiner is invited to contact the undersigned counsel in order to further the prosecution of this application in any way.

Respectfully submitted,

Date: January 14, 2011

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